

FILED  
Clerk  
District Court

JUL 10 2008

For The Northern Mariana Islands  
By \_\_\_\_\_  
(Deputy Clerk)

Eric John Tudela Mafnas  
Reg, No. 00483-005  
FCI Safford  
P.O. Box 9000  
Safford, AZ 85548

Pro Se

UNITED STATES DISTRICT COURT  
NORTHERN MARIANA ISLANDS

ERIC JOHN TUDELA MAFNAS,  
Movant,

vs.

UNITED STATES OF AMERICA,  
Respondent(s).

**CV 08-0031**

Case No: CR-04-00038-001

Memorandum of law in Support of  
Motion to Vacate Pursuant to  
Section 28 U.S.C. §2255.

Comes Now, ERIC JOHN TUDELA MAFNAS, movant Pro Se, Pursuant to  
Title 28 U.S.C. §2255, and shows to this Court as follows:

1) Movant Eric John Tudela Mafnas (herein- after "Mafnas")  
On about December 2003, Continuing to in or about January 2005,  
Petitioner was charged in a Nine (9) count indictment with violating  
Title 18 U.S.C. § 371, which constituted count one (1); Title  
18 U.S.C. § 666, which constituted count two(2); Title 21 U.S.C. 846,  
841(a)(1), 841(b)(1)(b), which constituted count three(3); Title  
21 U.S.C. §841(a)(1) & 841 (b)(1)(B), which constituted count four(4);  
Title 18 U.S.C. § 1001, which constituted count five(5) & (6); Title  
18 U.S.C. § 1623, which constituted count seven(7) & eight(8); Title  
18 U.S.C. § 3, which constituted count nine(9). Mr. Mafnas was  
represented at the initial arraignment and trial by Ms. Stephanie G.  
Flores of the Torres Brother Law Firm.

1 Before sentencing phrase, attorney Ms.Flores was fired due  
2 to a conflict of interest. Attorney at law Mr.Howard G.Trapp was  
3 retained during sentencing. He also filed a direct appeal for  
4 movant in this case. Trial in this case commenced on August 8,  
5 2005, and lasted approximately seven days . Mafnas was subsequently  
6 found guilty on counts 1,2,3,4,5,7 by a jury on August 16,2005.

7 Pre-trial motion pertaining to continues, motion in limine  
8 and motion to suppress were filed and subsequently denied. No  
9 motion was filed pertaining to counts 1,2,3,4,5,7, of the  
10 indictment.

11 Mafnas is currently serving the sentence of 235 months at FCI  
12 Safford, located in Safford, AZ. Base on the constitutional and  
13 procedural errors committed before trial, at trial, and during  
14 sentencing. Mafnas's conviction and sentencing shall be void,  
15 and the indictment must be dismissed with prejudice.

16 2) **This conviction was obtained in violation of the Sixth**  
17 **Amendment's right to Ineffective Assistance of Counsel.**

18 A criminal defendant's right to counsel includes the right  
19 to be represented by an attorney with undivided loyalty. see  
20 LOCKHART v. TERHUNE, 250 F.3d 1223 (9th Cir.2001). Because of  
21 the conflict between Mafnas and attorney Ms.Flores, petitioner  
22 was unable to exploit his defense fully. Before trial defendant  
23 objected to his attorney's representation due to the conflict  
24 he had with her. Defendant also informed the court of the conflict  
25 between him and Ms.Flores, and that his attorney had represented  
26 one of the witness that he wish to call as part of his defense.  
27 Attorney refuse to call Mr.Matagolai as a witness due to a prior  
28 confidential communication. In this matter a hearing was held,  
in chambers with judge Wallace Tashima who presided over the matter

1 and he denied my motion for substitution of counsel. Trial court  
2 also violated due precess Clause by excluding me from conference  
3 of substitution of counsel. see BRADLEY v. HENRY, App. Lexis 11954  
4 (9th Cir. June 22,2005) ( Trial court violated due process Clause  
5 by excluding accused from in camera conference at which trial  
6 court substituted appointed counsel for current, retained counsel).  
7 see also POWELL v. ALABAMA, 287 U.S.. 45, 77 LED 158, 53 S.Ct.  
8 55 (1932) An accused has a fundamental right to be represented  
9 by counsel of his own choice. see ATLEY v. AULT, 191 F.3d 865  
10 (8th Cir. 1999) Failure to conduct an adequate inquiry into defense  
11 counsel's potential conflict of interest constitutes a violation  
12 of the Sixth Amendment right to counsel that requires reversal.

13 Counsel for defendant also failed to object to two bias jurors  
14 who may have not been truthful when reaching the guilty verdicts.  
15 One of the jurors Lillian Basa Cruz, son was arrested in a murder  
16 case were defendant and Co-defendant utilized their informant to  
17 help solve the case. Juror Ms.Christiana Cabrera Duenas, husband  
18 was arrested by DPS official's. see UNITED STATES v. TURKER, 137  
19 F.3d 1016(8th Cir.1998) (Evidence of jurors bias and misconduct  
20 required evidentiary hearing). During trial attorney Flores also  
21 failed to object to the prosecution for seeking additional charges  
22 solely yo punish petitioner for exercising a constitutional or  
23 statutory right. see UNITED STATES v. HAMILTON, 391 F.3d 1066  
24 (9th Cir. 2004) Where defense counsel is absent during critical  
25 stage of criminal proceedings, prejudice to defendant is presumed.

26 See EXHIBIT A. Which is a Declaration of attorney Ms.Flores.  
27 This declaration of Flores shows that there were some kind of  
28 ~~conflict of interest with defendant Mafnas during trial.~~

1       **3) Retained counsel was ineffective during trial and**  
2       **counsel ineffectiveness prejudiced defendant.**

3       In count 2., of the indictment the government charged violation  
4 of Title 18 U.S.C. § 666.

5       Counsel was ineffective for failing to challenge the goverment's  
6 interpretation of § 666. The government's proof failed to establish  
7 a necessary element of the crime: the existence of a single scheme  
8 involving theft of \$5,000 worth of cash or property from DPS.

9       See UNITED STATES v. VALENTINE, 63 F.3d 459 (6th Cir. 1995)  
10 (Government agent must convert more than \$5,000 in a single year  
11 to violate 18 U.S.C. § 666).

12       Counsel was ineffective for not arguing that the information  
13 in count 1., of the indictment does not criminalize defendant's  
14 conduct for three reason: (1) the \$5,000 misappropriation threshold  
15 was not met; (2) the funds of (Drug dealer 1 and 2 ) were not conne-  
16 cted to a federal program; (3) statute exempt employee services.

17       See STRICKLAND v. WASHINGTON, 466 U.S. 668(1984), states: "A  
18 defendant claiming ineffective assistance of counsel must show  
19 (1) that counsel's representation "fell below an objective standard  
20 of reasonableness," and (2) that counsel's deficient proformance  
21 prejudiced the defendant." Id., at 694.

22       It is the contention of Mafnas that counsel's failure to argue  
23 these very issues pertaining to count 1 and 2, overlooked a critical  
24 factor in the government's case. The guilty verdict of count 1  
25 & 2, of the indictment was based on facts neither admitted by the  
26 defendant nor proved to a jury. It can be determine that defendant's  
27 ~~trial counsel made no attempt, to preserve this very issue for~~  
28 appeal. Had counsel investigated whether defendant stole funds,

petitioner would not have received the two-level enhancement as to count 2, of the indictment. see LORD v. WOOD, 184 F.3d 1083, 1093(9th Cir.1999) ("A lawyer who fails adequately to investigate, and introduce into evidence, information that demonstrates his client's factual innocence, or that raises sufficient doubts as to that question to undermine confidence in the verdict, renders deficient performance.") see **EXHIBIT B**, which is trial transcripts page 900, 906, 907 and 909. **EXHIBIT B**, is testimonial statement of Urbano D. Babauta.

Trial counsel was also ineffective for failing to suppress petitioner's statement's that was obtained in violation of his Miranda Rights. This privilege is protect by informing criminal suspects that they have "the right to remain silent," pursuant to MIRANDA v. ARIZONA, 384 U.S. 436, 460 (1966). In this case FBI agents failed to terminate interrogation after petitioner question them about his right to an attorney. see **EXHIBIT C**. see GUIDRY v. DRETKE, 397 F.3d 306(5th Cir. 2005) (Confession should have been suppressed because police officers failed to honor assertion of right to counsel.; AVELA v. MARTIN, 380 F.3d 915 (6th Cir.2004) Confession should have been suppressed because petitioner's naming of attorney, showing business card, and stating that "maybe I should talk to [named attorney]" constituted adequate assertion of right to counsel.; MCGRAW v. HOLLAND, 257 F.3d 513 (6th Cir.2001) (Police violated Miranda by failing to "scrupulously honor" accused's right to silence). **EXHIBIT C**. is a copy of involuntary statement of Mafnas that was obtained by FBI agents. If trial counsel had filed a motion to suppress these statements defendant would not have received the two-level



1 enhancement as to count 5, of the indictment. The two level  
2 enhancement defendant received was based on a confession made to  
3 FBI agents during an interrogation. These confession were obtained  
4 in violation of defendant's Miranda rights. See MARTIN v. MAXEY,  
5 98 F.3d 844 (5th Cir.1996) (Failure to file a motion to suppress  
6 could be grounds for ineffectiveness). In this case counsel's  
7 failure to even request a suppression hearing or file a motion  
8 at all, partaining to count 5, constitutited deficient performance  
9 and prejudiced defendant in this case.

10 Trail counsel also failed to interview or attempt to interview  
11 any of the prosecutions key witnesses ot the case. See JOHNSON  
12 v. BALDWIN, 114 F.3d 835, 837-40(9th Cir.1997) (holding that  
13 defense counsel's failure to talk to more than two witnesses  
14 prior to trial constituted deficient performance); U.S. v. TUCKER,  
15 716 F.2d 576, 584 (9th Cir. 1983) ( holding that the failure  
16 to interview or attempt to interview key prosecution witnesses  
17 constitutes deficient performance); BAUMANN v. U.S., 692 F.2d  
18 565, 580 (9th Cir. 1982) ("We have clearly held that defense  
19 counsel's failure to interview witnesses that prosecution intends  
20 to call during trial may constitute ineffective assistance of  
21 counsel.").

22 Counsel Ms.Flores also never advised petitioner of any global  
23 plea offer in this case. Defendant clearly suffered a Sixth Amend-  
24 ment violation when he receives ineffective assistance of counsel.

25 In order to prove ineffective assistance, Mafnas must show  
26 (1) "that counsel's representation fell below an objective standard  
27 of reasonableness"; and (2) "that there is a reasonable probability  
28 that, but for counsel's unprofessional errors, the result of

1 the proceeding would have been different. "**STRICKLAND**", 466 U.S.  
2 at 668, 694, 104 S.Ct. 2052. A defendant suffers a Sixth Amend-  
3 ment injury where his attorney fails to convey a plea offer.

4 Defense counsel have constitutional duty to give their clients  
5 professional advice on crucial decision of whether to accept  
6 a plea offer from the government. See BORIA v. KEANE, 99 F.3d  
7 492, 498(2d Cir.1996); UNITED STATES v. BLAYLOCK, 20 F.3d 1458  
8 (9th Cir 1994).

9 Pursuant to 28 U.S.C. §2255, a district court must grant a  
10 hearing to determine the validity of petition brought under that  
11 section, "[u]nless the motions and files and records of the case  
12 conclusively shows that the prisoner is entitled to no relief."  
13 28 U.S.C. § 2255.

- 14 4) Appellate counsel was ineffective for failing to  
15 file issues related to conviction and sentencing.  
Counsel's deficient performance was prejudicial.

16 The guarantees of the Sixth Amendment's right to effective  
17 assistance of counsel also extends to the effective assistance  
18 of appellate counsel. See U.S. v. MANNINO, 212 F.3d 835(3rd Cir.  
19 2000) The **STRICKLAND** test of effective assistance of counsel  
20 applies with equal force to analysis of the performance of appellate  
21 counsel. See U.S. v. TOMS, 396 F.3d 427 (D.C. Cir.2005) The Sixth  
22 Amendment right to effective assistance of counsel claim may  
23 be raised on a motion to vacate, set aside, or correct a sentence.

24 On direct appeal Mafnas was represented by attorney Howard G.  
25 Trapp, Esq. (here in after "Trapp"). Mafnas communicated, via  
26 U.S. mail service, and through family members with Trapp and  
27 pointed out serveral issues that defendant wanted addressed in  
28 his appeal brief. See **Exhibit D**. U.S. mail and communication.

1 Defendant requested that Trapp address the issue of the district  
2 court denial of counsel's motion to substitute counsel due a  
3 conflict of interest. See DELGADO v. LEWIS, 181 F.3d 1087, 1092  
4 (9th Cir. 1999) ("Appellate counsel has an ethical [duty] of  
5 constitutional dimension to argue zealously those issues that  
6 counsel finds not wholly frivolous.")

7 Trapp couldn't have found this issue frivolous when trial  
8 counsel made every attempt to preserve this issue for appeal.  
9 Also had counsel reviewed the trial transcripts this very issue  
10 would have leaped out in his face. Therefore, he could not have  
11 found this issue frivolous. It can be determined from the face  
12 of the record that trial counsel made every attempt, but her  
13 request was denied. Had Trapp address this issue on appeal it  
14 is highly probable that this motion, \$2255 would not be before  
15 this court in this instant.

16 It is clearly established law that the failure to conduct  
17 an adequate inquiry into counsel's potential conflict of interest  
18 constitutes a violation of the Sixth Amendment right to counsel  
19 that requires a reversal. See ATLEY v. AULT, 191 F.3d 865 (8th  
20 Cir.1999). See also POWELL v. ALABAMA, 287 U.S. 45, 77 L.Ed 158,  
21 53 S.Ct. 55 (1932) (An accused has a fundamental right to be  
22 represented by counsel of his own choice.

23 In this case defendant clearly received ineffective assistance  
24 of counsel on appeal in violation of his Sixth Amendment rights.

25 See LOCKHART v. TERHUNE, 250 F.3d 1223(9th Cir. 2001)  
26 Defendant's Sixth Amendment right to counsel includes the right  
27 to be represented by an attorney with undivided loyalty. See  
28 also KAUFMAN v. U.S., 394 U.S. 217, 22 L.Ed.2d 227, 89 S.Ct.



1 (1969) Federal Habeas Corpus relief is not to be denied to  
2 prisoner's alleging constitutional deprivation solely on the  
3 ground that relief should have been sought by appeal.

4 The Due Process Clause of the Forteenth Amendment guarantees  
5 the right to effective assistance of counsel on first appeal as  
6 of right. EVITTS v. LUCEY, 469 U.S. 387, 396-99(1985).

7 Appellate Counsel Trapp was ineffective in failing to present  
8 claims that was much stronger than the issues he raised on movant's  
9 direct appeal. Because direct appeal is a "critical stage" of a  
10 proceeding, the defendant should not be procedurally defaulted.

11 During direct appeal attorney Trapp failed to raise or  
12 argue defendant's conviction or sentencing which was clearly  
13 ineffective. The Supreme Court has made it clear that in reviewing  
14 a lawyer's performance, a court's scrutiny must be highly  
15 deferential." STRICKLAND, 466 U.S. at 689, 104 S.Ct. 2052.

16 Because of appellate counsel's ineffectiveness, Mafnas recieved  
17 ineffective assistance of counsel on appeal in violation of his  
18 Sixth Amendment right. Counsel's error rendered the proceedings  
19 "fundamentally unfair and unreliable" in addition to simply  
20 showing prejudice. See CEJA v. STEWART, 97 F.3d 1246 (9th Cir.1996)  
21 Multiple errors, even if harmless indivdually, may entitle  
22 petitioner to habeas relief if their cumulative effect prejudice  
23 defendant. See also MCCLESKEY v. ZANT, 499 U.S. 467,497,113 L.Ed.2d  
24 517, 111 S.Ct. 1454, 1471-72 (1991) (Habeas petitioner may excuse  
25 procedural bar and abuse of writ by showing cause and prejudice  
26 or actual innocence.

27 Appellate counsel was ineffective for failing to object to  
28 application of guildelines that increased Mafnas sentence.

1 Appellate counsel failed to make any objection to PSR, Counsel  
2 at sentencing and on appeal provided ineffective assistance  
3 by failing to challenge the sufficiency of the evidence supporting  
4 defendant's conviction for conspiring to distribute, approximately  
5 46 grams of methamphetamine attributed to movant for sentencing  
6 purposes. See WILLIAMS v. TAYLOR, 529 U.S. 362, 146 L.Ed.2d  
7 389, 120 S.Ct.1495 (2000) Failure to present mitigating evidence  
8 during sentencing constituted ineffective assistance. See also  
9 U.S. v. MANNINO, 212 F.3d 835 (3rd Cir.2000) The **Strickland** test  
10 of ineffective assistance of counsel applies with equal force  
11 to analysis of the performance of appellate counsel.

12 Attorney Trapp also failed to fulfill the constitutionally-  
13 imposed duty to consult with defendant about what issues to raise  
14 on appeal. He never consulted with me before filing the one and  
15 only issue, which also had nothing to do with my conviction or  
16 sentence. See BARNETT v. HARGETT, 174 F.3d 1128, 1135 (10th Cir.  
17 1999) (deficiency of appellate counsel can be established by showing  
18 that counsel failed to raise an issue that was obvious from the  
19 trial record); UNITED STATES v. COOK, 45 F.3d 388, 395 (10th Cir.  
20 1995) (same in § 2255 context); UNITED STATES v. HEADLEY, 923 F.3d  
21 1079, 1084 (3rd Cir 1991) (failure to raise obvious and potentially  
22 successful sentencing cannot be said to have been a strategic  
23 choice but, rather, amounts to ineffective assistance).

24 See, e.g., MURRAY v. CARRIER, 477 U.S. 478, 488, 106 S.Ct.  
25 2639, 91 L.Ed.2d 397 (1986) (counsel's errors that rise to con-  
26 stitutional ineffectiveness under the Strickland constitute cause  
27 for procedural default. In this case defendant has established  
28 the necessary prejudice under FRADY, 456 U.S. at 170, 102 S.Ct 1584.

1 Counsel for defendant was ineffective for failing to perfect  
2 direct appeal. After sentencing there was a complete lack of  
3 communication between Trapp, because he failed to inform defendant  
4 of any advantages or disadvantages for appeal. The only issue that  
5 counsel filed , was the issue of "punishment inflicted on Mafnas's  
6 Fifth Amendment protection against multiple punishment."

7 In Strickland, the Court stated that, although in the usual case  
8 a defendant must establish both that counsel's proformance was  
9 deficient and that he was prejudice by that deficiency, "[i]n  
10 certain Sixth Amendment contexts, prejudice is presumed." **STRICKLAND**,  
11 466 U.S. at 692, 104 S.Ct. at 2067.

12 Abandonment is a per se violation of the Sixth Amendment. **UNITED**  
13 **STATES v. CRONIC**. 466 U.S. 648, 658-59, 104 S.Ct. 2039, 2046-47,  
14 80 L.Ed.2d. 657 (1984).

15 The issue raised in defendant's direct appeal was so frivolous  
16 that the judge and the U.S. attorney informed Trapp of the meritless  
17 claim. The Sixth Amendment guarantees that the accused shall "have  
18 the Assistance of Counsel for his defence." "The plain wording of  
19 this guarantee thus encompasses counsel's assistance whenever  
20 necessary to assure a meaningful "defence.'" **UNITED STATES v. WADE**,  
21 388 U.S. 218, 225, 87 S.Ct. 1926, 1931, 18 L.Ed.2d 1149 (1967). See  
22 **POWELL v. ALABAMA**, 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.Ed. 158  
23 (1932) (Criminal defendant "requires the guiding hand of counsel  
24 at every step in the proceedings against him."); **COLEMAN v. ALABAMA**,  
25 399 U.S. 1, 7, 90 S.Ct. 1999, 2002, 26 L.Ed.2d 387 (1970).

26 In this case prejudice is presumed because defendant was totally  
27 denied the opportunity to a fair proceeding. Attorney Trapp clearly  
28 failed to make a reasonable effort to perfect defendant's appeal.

1 In EVITTS v. LUCEY, 469 U.S. 387, 105 S.Ct. 830, L.Ed.2d  
2 821 (1985), the Court held that the Due Process Clause of the  
3 Fourteenth Amendment guarantees a criminal defendant the right  
4 to effective assistance of counsel on appeal.

5 Appellate counsel was ineffective for failing to argue the  
6 issue of constructive amendment of the indictment as to count 4.

7 The indictment charged intent to distribute, approximately  
8 46 grams of methamphetamine. The only evidence the government  
9 presented at trial of any drugs being distributed was the statement  
10 of Carl Cabrebr. During cross-examination by the government Carl  
11 stated "Mafnas sold him a half, .5 or .6 grams of meth on 12  
12 different occasions."

13 When the government failed to prove the distribution of 46  
14 grams of methamphetamine as to count 4, of the indictment. This  
15 clearly violated the Grand Jury Clause of the Fifth Amendment  
16 which guarantees that an accused is only required to answer the  
17 unique allegations of the indictment returned by Grand Jury.  
18 See RUSSEL v. UNITED STATES, 369 U.S. 749, 768-771 (1962), See  
19 also U.S. v. McDERMOTT, 245 F.3d 133 (2d Cir.2001) (Variance between  
20 conspiracy charged and proof at trial).

21 A Constructive amendment occurs when the evidence presented  
22 at trial proves a crime different than charged in indictment.  
23 See STIRONE, 361 U.S. at 217 (Constructive amendment when indictment  
24 alleged obstruction of sand importation and evidence introduced  
25 showing interference with still exportation), See U.S. v. PAZSINT,  
26 703 F.2d 420, 422-24 (9th Cir.1983) (Amendment of indictment when  
27 assault charge added because assault mentioned only in indictment's  
28 caption).

1       Petitioner brings to this court attention that ineffective  
2 assistance of trial and appellate counsel supplies the cause needed  
3 to excuse his procedural default. See Mcfarland v. YUKINS , 356  
4 F. 3d 688,699 (6th Cir. 2004).

5       In this case trial counsel was ineffective for failing to  
6 challenge the sufficiency of the evidence as to count 4., possession  
7 with intent to distribute a controlled substance.

8       Appellate counsel was ineffective for failing to argue that  
9 trial counsel was ineffective for failing to challenge the suffic-  
10 iency of the evidence as to count 4. In this case trial counsel  
11 failed to understand the elements of the charged offense of Title  
12 21 U.S.C. 841(a)(1) and 841(b)(1)(B). because the only evidence  
13 the government presented at trial as to count 4., was that Mafnas  
14 had posses the 46 grams of methamphetamine. There were no testimony  
15 or no evidence to support the jury's verdict that Mafnas intended  
16 to distribute the 46 grams in count 4. Trial counsel failed to  
17 hold the government to proving that defendant knowingly and  
18 intentionally possess with intent to distribute, approximately  
19 46 grams of meth. Counsel failed to argue a lesser punishment  
20 under section 841(a)(1) and 841(b)(1)(B), in count 4., of the  
21 indictment.

22       The Due Process Clause of the Fourteenth Amendment guarantees  
23 the right of ineffective assistance of counsel on a first appeal  
24 as of right. EVITTS v. LUCEY, 469 U.S. 387, 396099 (1985) see also  
25 McMANN v. RICHAESON, 397 U.S. 759, 771 n.14 (1970) (Sixth Amendment  
26 right to counsel is right to effective assistance of counsel).  
27 The right to effective assistance applies to both retained and  
28 appointed counsel.



1       5)       **This Conviction was obtained through Prosecutorial**  
2               **Misconduct and Due Process violation.**

3       A prosecutor violates due process when he seeks additional  
4 charges solely to punish a defendant for exercising a constitu-  
5 tional or statutory right. See BORDENKIRCHER v. HAYES, 434 U.S 357,  
6 363, 98 S.Ct. 663, 54 L.Ed.2d 604(1978); HERNABDEZ-HERRERA, 273 F.3d  
7 1213, 1217 (9th Cir.2001).

8       To establish a claim of vindictive prosecution, the defendant  
9 must make an initial showing that charges were added because the  
10 accused exercised statutory, procedural or constitutional right.

11       In defendant's Presentence Investigation Report("PSI"), the PSI  
12 added(+2) level for the loss of more than \$5,000.00. Mafnas also  
13 received a (+2) point enhancement for embezzling, stealing obtaining  
14 by fraud at the value of \$5,00.00 and more.

15       Petitioner's due process right were violated because the govern-  
16 ment vindictively prosecuted mafnas by stacking the (+2) points  
17 for the loss more than 5,000.00 and embezzling, stealing, by fraud  
18 at the value of 5,000.00.

19       The prosecutor also violated due process by sentencing defendant  
20 on inaccurate information for druge quantity and quality.

21       In this case the government nor the sentencing court could not  
22 determine the quantity of drugs Mafnas was responsible for under  
23 the guidelines merely by relying upon the testimony statement of  
24 Carl Cabrera.

25               Section 2D1.1 (C) provides for base offense level of 16.  
26               when the quantity of Methamphetamine for which a defendant  
              is found accountable falls between 5 grams ans 10 grams.

27       The government's witness Carl Cabrera testified that be brought  
28 a half, .5 , or .6 of methamphetamine from defendant on 12 different

1 occasion during the relevant time period. Not one witness ever  
2 testified that they bought the 46 grams alleged in count 4. of  
3 the indictment. See MOORE v. UNITED STATES, 571 F.2d 179, 183-84  
4 and n. 7 (3d Cir. 1978) (due process may require resentencing when  
5 information on which sentencing court relied in PSI in mistaken  
6 or unreliable.

7 The government witness Carl Cabrera observed the drugs he claim  
8 defendant sold to him, but there were no evidence that he ever  
9 weight them his self. In this case Carl was allowed to testify to  
10 an accurately amount of drugs sold to him without having actual  
11 weight of each pur chase.

12 See Federal Rule of Evidence 602. "Lack of Personal  
13 knowledge" Provides in pertinent Part: A witness may  
14 not testify to a matter unless evidence is introduced  
15 sufficient to support a finding that the witness has  
16 personal knowledge of the matter. Evidence to prove  
17 personal knowledge may, but need not , consist of  
18 witness' own testimony.

19 The government was allowed to Constructively Amemd indictment  
20 through its jury instruction No.29. **Exhibit E.**

21 Because the Fifth Amendment guarantees s defendant the right to  
22 be tried for only those offenses presented in an indictment returned  
23 by a grnad jury substantive amendments to indictment are reversible  
24 error.

25 See Instruction No. 29.

26 In this case the government requested, and granted, a jury  
27 instruction which added aiding and abetting to the indictment.

28 The addition of the aiding and abetting allowed the jury to  
convict on less than all the elements required to convict on a  
Conspiracy count, Theft, Perjury and Make false Statements charges.

1 This violates the Grand Jury Clause of the Fifth Amendment  
2 which guarantees that an accused is only required to answer the  
3 unique allegations of the indictment returned by the Grand Jury.  
4 See RUSSELL v. UNITED STATES, 369 U.S. 749, 768 (1962).

5 The Supreme Court has explained, an indictment's main purpose  
6 is " to inform the defendant of the nature of the accusation against  
7 him. "RUSSEL, 369 U.S. at 767.

8 It is hence well-established that a defendant "cannot be held  
9 to answer a charge not contained in the indictment brought against  
10 him. "SCHMUCK v. UNITED STATES, 489 U.S. 705, 717 (1989).

11 Conviction obtained in violation of Grand Jury Clause of the  
12 Fifth Amendment (in addition to prosecutorial Misconduct).

13 The indictment in this case, pertaining to count two, clearly  
14 reads:

15 On about April 2002 through about December 2003, in the District  
16 of the Northern Mariana Island and elsewhere, the defendants  
17 ERIC JOHN TUDELA MAFNAS and CHARLEY K. PATRIS, being agents of  
18 a State agency, namely, the CNMI Department of Public Safety, an  
19 agency that received in excess of \$10,000 in federal funding  
20 annually, unlawfully, knowingly and intentionally, embezzled,  
21 stole, obtained by fraud, and otherwise without authority knowingly  
22 converted to the use of persons other than the rightful owner,  
23 and intentionally misapplied, property that was valued at \$5,000  
24 and more, owned by, and under the care, custody and control of  
25 the CNMI Department of Public Safety. This is a violation of  
26 Title 18, United States Code, Sections 666(a)(1) and 2.

27 See Exhibit B. which is testimony statement of Mr. Babauta,  
28 which is a government agent of (AGIU).

**Exhibit B. Cross-Examination (Urbano D. Barauta)**

Transcript page 907 3-4.

Q. You're just telling us that you issued \$1000 to Mr.Mafnas for an SIS operation, right?

A. Yes.

Transcript page 907: 21-23.

Q. You're not telling us that Mr.Mafnas stole \$1000 from, AGIU, Correct?

A. Yes.

The indictment in this case charged Mafnas with Obtaining over \$5,000 in federal funds on about April 2002 through about December 2003.

Amendment occurs when the prosecution or the court either literally or constructively alters the charging terms of an indictment after it has been returned by the grand jury.

Contructive amendment occurs when the evidence presented at trial proves a crime different from that charged in the indictment.

The only evidence that the government could present during defendant's trial of any money stolen or issued was the \$1000 that defendant received from AGIU, on June 23, 2003.

During trial AGIU official Mr.Babatua, testified as to whether Mafnas had stole any money from DPS. See Page 907. of Transcripts

See U.S. v. CHOY, 309 F.3d 602(9th Cir. 2002) (Even under plain error review, if constructive amendment to indictment prejudice defendant, the conviction must be reversed.; See also UNITED STATES v. ROSARIO-DIAZ, 202 F.3d 54(1st Cir.2000) If a court permits a jury to convic a defendant on evidence of a crime not included in the indictments, the constitutional right to grand jury is violated.

1 Prosecution in this case was allowed to present incarcerated  
2 witness' testimony, statement without prior findings of constitutional  
3 unavailability, was unreasonable application of clearly established  
4 Supreme Court precedent.

5 In CRAWFORD, the Court held that the Sixth Amendment's  
6 Confrontation Clause gives criminal defendant's the right to confront  
7 "testimonial" witness statements. 541 U.S. at 68-69, 124 S.Ct. 1354.

8 In Mafnas case, "testimonial statement" included statements  
9 taken by police/FBI officials. During trial the government presented  
10 statements of ("Drug Dealer No.1") in count 1. The government's  
11 statement of Drug dealer No 1. states that defendant stole \$2530  
12 from dealer No. 1. after he was arrested on April 29, 2002.

13 There were no evidence presented during trial or no testimonial  
14 witness presented at trial.

15 Testimonial hearsay evidence may be admitted over the objection  
16 of the defendant only when the common law requirements of  
17 "unavailability and a prior opportunity for cross-examination" are  
18 met.

19 In this case, statements of government witness Darrel Quitugua  
20 was presented during trial and use to get an indictment as to count 1,  
21 and 2, for overt Acts.

22 The government also presented statements of (Drug dealer No.2)  
23 in which he states that Mafnas and Patris stole approximately  
24 \$3,220 that had been seized from a person arrested for ice traff-  
25 icking on November 7, 2003.<sup>1</sup>

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26  
27 1. There is also a question of whether these statements violates  
28 the Sixth Amendment's right to confrontation. See UNITED STATES v.  
ORELLANO-BLANCA, 294 F.3d 1143, 1150 (9th Cir. 2000)



CONCLUSION

For the foregoing reasons, and questions of law and facts, Mafnas requests this Honorable Court to make an Order with findings, facts and conclusion of law. Defendant also request an Order entering the granting of a hearing to make the requisite determinations; that Mafnas be present at the hearing on this instant motion to vacate sentence, pursuant to 28 U.S.C. §2255; that after such determinations the judgment in this case be hereto vacated, and the indictment be dismissed with prejudice, or whatever this Court deems fair and just.

I Eric Mafnas, declare under penalty of perjury that the foregoing is true and correct. 28 U.S.C. §1746.

Dated this 28<sup>th</sup> day of May, 2008

Respectfully Submitted,

By Eric John Tudela Mafnas  
ERIC JOHN TUDELA MAFNAS  
REG, NO. 00483-005  
FCI SAFFORD  
P.O. BOX 9000  
SAFFORD, AZ 85548